



In the Matter of:

**RASPUTIN, INC. AND
WILLIAM JOHNSON,
RESPONDENTS**

ARB CASE NO. 03-059

ALJ CASE NO. 97-SCA-32

DATE: May 28, 2004

**Regarding a dispute over the issues
of back pay, debarment and applicability
of automatic bankruptcy stay.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Michael Bornstein, Esq., *Bornstein Law Offices, Inc., Columbus, Ohio*

For Respondent Administrator, Wage and Hour Division:

**Leif G. Jorgenson, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard
M. Radzely, Esq., Solicitor, *U.S. Department of Labor, Washington, D.C.***

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board (the Board) pursuant to the statutory authority of the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C.A. § 351-357 (West 1994).

William Johnson (Johnson) seeks the Board's review of a November 20, 2002 Decision and Order (D. & O.) that a United States Department of Labor Administrative Law Judge (ALJ) issued. The ALJ ruled that Rasputin, Inc. (Rasputin)¹ had committed SCA prevailing wage and fringe benefit violations and was therefore liable for back

¹ Rasputin did not file an answer to the complaint initiating this administrative proceeding and, on July 18, 2001, the ALJ issued a Decision and Order and ordered Rasputin to pay the balance of back wages due. The ALJ further ordered that Rasputin be debarred for a period of three years for violating the SCA.

wages in the amount of \$280,079.62 due service employees who worked as security guards under a United States Department of the Navy contract. Further, the ALJ ruled that Johnson, individually, was a “party responsible” for the prevailing wage violations within the meaning of the SCA and that Johnson, in addition to Rasputin, was liable for the violations and should be debarred from doing business with the Federal government for a period of three years for these violations of the Act. D. & O. at 10-11. The ALJ further ruled that Johnson should not be relieved from the debarment sanction because he failed to demonstrate that the violations were the result of “unusual circumstances.” *Id.* at 22. Finally, the ALJ determined that the automatic stay provisions of the United States Bankruptcy Code did not operate to bar this administrative proceeding for determination of SCA back wages and debarment because this proceeding was an exercise of the Federal government’s police or regulatory powers. *Id.* at 23.

JURISDICTION AND STANDARD OF REVIEW

Our jurisdiction to hear and decide appellate matters under the Act is established by the regulations at 29 C.F.R. Parts 4 and 8 (2003) and Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).² Pursuant to 29 C.F.R. § 8.1(c), in rendering its decisions, “the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and finally as might the Secretary of Labor concerning such matters.”

The Board’s review of an ALJ’s decision is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). Pursuant to 29 C.F.R. § 8.9(b), the Board shall modify and set aside an ALJ’s findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. *See Dantran, Inc. v. United States Dep’t of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). However, conclusions of law are reviewed de novo. *Supervan, Inc.*, ARB No. 00-008, ALJ No. 94-SCA-14 (ARB Sept. 30, 2002); *United Kleenist Org. Corp. and Young Park*, ARB No. 00-042, ALJ No. 99-SCA-18, slip op. at 5 (ARB Jan. 25, 2002).

² From July 1992 until May 3, 1996, our predecessor, the Board of Service Contract Appeals rendered final agency decisions pursuant to the SCA. Under Secretary’s Order 2-96, 61 Fed. Reg. 19,978 (May 3, 1996), the Secretary of Labor established the Administrative Review Board and delegated to this Board jurisdiction to hear and decide administrative appeals arising under, inter alia, the SCA. Subsequent orders amending and updating the provisions relevant to the composition of the Board and its jurisdiction have superseded SO 2-96; however, the delegation with respect to the Act is essentially unchanged. The current delegation of authority is set forth in SO 1-2002.

ISSUES PRESENTED BY THE PETITION FOR REVIEW

- 1) Whether the ALJ properly concluded that Johnson was a “party responsible” for wage and fringe benefit violations within the meaning of the SCA and was therefore liable for the violations.
- 2) Whether the ALJ correctly held that Rasputin underpaid the wages and fringe benefits due service employees working under a service contract that was subject to the Act.
- 3) Whether the ALJ properly ruled that Johnson was subject to the debarment sanction and not be relieved from the sanction because he failed to demonstrate the existence of “unusual circumstances.”
- 4) Whether the ALJ correctly determined that the automatic stay provision of the Bankruptcy Code did not bar this administrative proceeding.

BACKGROUND

A preponderance of the evidence supports the ALJ’s findings of fact contained in the section of the D. & O. entitled “Summary of Evidence.” We hereby adopt those findings of fact as our own and incorporate them by reference in this Final Decision and Order. *See* D. & O. at 2-11. To the extent that particular facts in this matter are necessary to understanding the legal questions at issue in this matter, we will discuss those facts in the appropriate section of our discussion, below.

DISCUSSION

I. William Johnson is a “party responsible” for Rasputin’s SCA violations

We affirm the ALJ’s determination that Johnson, as an individual, was a “party responsible” for the prevailing wage and fringe benefit violations within the meaning of the SCA, which provides:

Any violation of any of the contract stipulations required by section 351(a)(1) [wages] or (2) [fringe benefits] or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of

any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract.

41 U.S.C.A. § 352(a) (emphasis added). The SCA does not define the term “party responsible.” However, one of the Act’s implementing regulations fills this gap and makes it clear that “party responsible” includes not only corporate officers or owners but also those individuals such as Johnson, who are found responsible for a service contractor’s performance of a contract. This regulation provides that

the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract who are bound by and accept responsibility for compliance with the Act and imposition of its sanctions set forth in the contract clauses in [29 C.F.R.] § 4.6, but includes all persons, irrespective of proprietary interest who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached.

29 C.F.R. § 4.187(e)(4) (emphasis added). Based on the preponderance of the evidence, this regulation requires that we affirm the ALJ’s finding that Johnson is a “party responsible” for Rasputin’s SCA violations.

The record here supports the ALJ’s finding that Johnson “was in *de facto* control” of Rasputin’s day-to-day operations. D. & O. at 13. In fact, the vast majority - far more than the preponderance noted by the ALJ - of the record evidence supports the ALJ’s conclusion that Johnson was a “party responsible” within the meaning of 41 U.S.C.A. § 352(a) and the regulation at 29 C.F.R. § 4.187(e)(4). In support of this conclusion, the ALJ cited the testimony of Rasputin’s on-site contract operations manager, Curtis Stewart, who testified that

he reported to William Johnson. He further testified that his authority as operations manager was subject to Johnson’s approval. Stewart dealt with and reported to no one else. According to Stewart, Johnson made decisions as to payrolls. Johnson made the decision to fire Holman [another Rasputin contract supervisor]. Furthermore, it was Johnson who decided what bills would be paid. It was under Johnson’s authority that Stewart had the authority to write pay checks. Stewart testified that William Johnson had final authority on all equipment.

D. & O. at 12 (transcript citations omitted). As he did before the ALJ, Johnson argues that we should disregard this testimony because Stewart “has an interest in absolving himself of responsibility.” *Id.* It may be true that Stewart had an interest in not being debarred himself. But even if Stewart could have been debarred for his role, Johnson is, nevertheless, a “party responsible” given his own actions or inactions. More importantly, the record demonstrates that Johnson “did not attempt to dispute any of the specific instances where, Stewart had testified, Johnson maintained responsibility for the contract and de facto supervisory control over him.” *Id.* at 12-13. Because Johnson was given the opportunity to refute the particulars of Stewart’s testimony and failed to do so, we accept Stewart’s testimony.

Irrespective of Stewart’s testimony, the record is replete with additional support for the conclusion that Johnson was a party responsible for the violations. A Wage and Hour Division investigator testified that during the course of her investigation Johnson personally held himself out to her as Rasputin’s president. Transcript (TR) II 121. The Navy’s contracting officer was also led to believe (apparently by Stewart and Benton; TR II 33-34) that “when it came to the last hours of the Contract, we had to get in touch with Mr. Johnson because those individuals had no authority over anything concerning the payroll, employees, or anything else.” TR II 33.

At this juncture, we note that Johnson “was not officially president of Rasputin at the time when the contract was bid and during its implementation up to the time of default.” D. & O. at 12; (transcript citation omitted).³ However, Johnson admitted to numerous indicia of his overarching and day-to-day control over Rasputin’s guard service operations throughout performance of the Navy contract. As the ALJ found:

Johnson admitted that he asked Stewart to work for Rasputin. He also *appointed* Stewart as administrator. Johnson admitted that he did provide some guidance to Stewart regarding key people who should be hired to fulfill the contract. In addition, Johnson acknowledged holding himself out as company president on the contract bid.⁴

³ The ALJ also found that Johnson owned no stock in Rasputin until August 1996, when Rasputin had already defaulted on the contract. D. & O. at 12.

⁴ In the final analysis, but for Johnson’s false representation to the Navy that he was its president, the Navy never would have awarded Rasputin the contract in the first place. As Johnson testified that in preparing to bid on the Navy contract, he told Benton to “just put yourself as title [sic] as Vice-President and bid the job. I knew that he would not qualify reference wise or anything else, so we listed me as the president of Rasputin, and Wayne Benton as the Vice-President.” TR II 164. Johnson even attended a preaward meeting where he purported to be Rasputin’s president. *See* Ex.G-2 at 3 (Standard Form 1405 Preaward Survey of Prospective Contractor): “Representing the contractor were: William Johnson, President, and Wayne Benton, Vice President of Security.”

D. & O. at 13 (transcript citations omitted; emphasis in original). We find that these admissions, alone, demonstrate that Johnson's control over Rasputin's day-to-day operations rises to the level of a "party responsible" according to the language of 29 C.F.R. § 4.187(e).

Case precedent also clearly supports the ALJ's finding that Johnson was a "party responsible" responsible for the SCA violations in this case, given the extensive level of control Johnson exercised over the day-to-day operation of the guard services contract. *See Houston Bldg. Services, Inc. and Jason Yoo*, ARB No. 95-041A, ALJ No. 91-SCA-30, slip op. at 3 (ARB Aug. 1, 1996) (individual who signed contract, was responsible for day-to-day operations including job assignments was a "party responsible").

The ALJ acknowledged Stewart's role in the violations, but found that Johnson, nevertheless, remained a "party responsible" as well. After recapping the numerous ways in which Johnson exercised day-to-day control of Rasputin, the ALJ concluded that

[Johnson] relied heavily on Stewart to administer the contract in accordance with a long history of working together. However, ... Johnson retained enough *de facto* responsibility for the administration of the contract and the supervision of the personnel to justify his being treated as a responsible person under DOL regulations.

D. & O. at 13. Accordingly, based on the preponderance of record evidence, we affirm the ALJ's conclusion that Johnson was a "party responsible" for Rasputin's SCA violations.

II. Rasputin violated the SCA when it failed to pay the appropriate collectively bargained prevailing wage and fringe benefit rates to service employees who worked on the contract

Section 4(c) of the SCA applied to Rasputin's contract for guard services. That provision requires that a successor service contractor such as Rasputin pay the wage rates, including prospective increases, contained in a collective bargaining agreement (CBA) negotiated by the predecessor contractor where "substantially the same services are furnished."⁵ 41 U.S.C.A. § 353(c). The record demonstrates that Rasputin was the successor contractor to DGS Services, Inc. (DGS), which provided guard services under

⁵ Section 4(c) is subject to two exceptions: where 1) the negotiated wages are found to be at "substantial variance" from actual locally prevailing wages; and 2) the collective bargaining agreement is found not to have been entered into as a result of "arms-length" negotiations. Parties must request the Administrator for a hearing to determine these questions. *See* 29 C.F.R. § 4.6(d)(2). Neither Rasputin nor Johnson requested hearings; therefore Rasputin's contract was subject to Section 4(c).

contract to the Navy. D. & O. at 15; Ex. R-1. Rasputin's contract included the requirement to perform additional guard services that DGS had previously performed; that second DGS contract was also subject to collectively bargained wages. D. & O. at 15; R-2.

Johnson argues that Section 4(c) did not apply to Rasputin's service contract because neither of the two CBAs negotiated by DGS was made a part of Rasputin's contract. We reject this contention. Section 4(c) obligations regarding a successor contractor's payment obligations are self-executing. 29 C.F.R. § 4.163(b) specifies that section 4(c) imposes "a direct statutory obligation and requirement ... on the successor contractor ... and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement." The Board has previously adopted this position regarding application of Section 4(c), stating that it "imposes a direct statutory obligation and is self-executing. . . . As expressly provided in Section 4.163(b), it is unnecessary for Section 4(c) coverage to be reflected in the pertinent wage determination." *In re General Services Admin., Region 3*, ARB No. 97-052, slip op. at 13 (Nov. 21, 1997); see also *Houston Bldg. Services, Inc.*, ARB Case No. 95-041A, slip op. at 5 (Aug. 21, 1996).

Next, Johnson challenges the ALJ's conclusion regarding which of the two CBAs applied to Rasputin's contract. One – the Security Guard CBA - required payment of \$6.26 hourly for the classification of "Security Guard." The other (the Guard I/Guard II CBA) established hourly wages of \$6.01 and \$8.59 for the classifications of Guard I and Guard II, respectively.

The implementing regulations establish the methodology for selecting the proper CBA rates to apply to a contract where, as with Rasputin's contract, two predecessor contracts with two separate CBAs are concerned. The regulations provide that:

where there is more than one predecessor contract to the new or consolidated contract, and where the predecessor contracts involve the same or similar function(s) of work, using substantially the same job classifications, *the predecessor contract which covers the greater portion of the work in such function(s) shall be deemed to be the predecessor contract for purposes of section 4(c)*, and the collectively bargained wages and fringe benefits under that contract, if any, shall be applicable to such functions.

29 C.F.R. § 4.163(g) (emphasis added). However, Rasputin failed to follow this regulatory directive and chose to pay the wage rates contained in the Guard I/Guard II CBA "based, in part, on reference to the work requirements described in the contract." D. & O. at 19.

During the performance of its contract, Rasputin sought clarification of this ambiguous situation from the Wage and Hour Division. D. & O. at 18. Applying 29 C.F.R. § 4.163(g), the Wage and Hour Division's investigator determined that the Security Guard CBA covered the larger portion of the similar work performed under the predecessor contracts. This result obtained whether using the number of employees working on the predecessor contracts or the dollar amount of those contracts. TR II at 70-73. Yet, in spite of this direct guidance, Rasputin (and, being in "*de facto* control," Johnson) used the lower wage rate from the Guard I/Guard II CBA. We agree with the ALJ's conclusion regarding Rasputin's and Johnson's decision to ignore the investigator's advice. "At their peril, Respondents ignored the guidance provided by the regional office as to the proper method for determining the applicable wage rates." *Id.* at 19.

Johnson further argues that even if Section 4(c) governed Rasputin's contract and the Security Guard CBA was otherwise applicable, a regulatory exemption from the requirements of Section 4(c) relieves Rasputin and him of liability. Johnson bases this argument on the regulation, which provides, in pertinent part:

Section 4(c) will be operative only if the employees who worked on the predecessor contract were actually paid in accordance with the wage and fringe benefit provisions of a predecessor contractor's collective bargaining agreement. Thus, for example, *section 4(c) would not apply if the predecessor contractor entered into a collective bargaining agreement for the first time, which did not become effective until after the expiration of the predecessor contract.*

29 C.F.R. § 4.163(f) (emphasis added). Johnson contends that Section 4(c) did not apply because 1) DGS did not actually pay its employees pursuant to the Security Guard CBA and 2) DGS's prospective wage increases under the CBA deemed applicable (pursuant to 29 C.F.R. § 4.163(g)) did not go into effect during the term of the predecessor's contract.

The ALJ concluded that Johnson failed to demonstrate that the requirements for any exemption from Section 4(c) had been met. D. & O. at 17. In the first place, the record contains evidence that the applicable CBA wage rates were paid during the predecessor contract. *Id.* Secondly, the fact that the prospective wage increases became effective after the end of the predecessor contract is not relevant. One of Section 4(c)'s requirements, after all, is that a successor contractor must pay the prospective wage increases contained in an otherwise applicable CBA negotiated by the predecessor contractor. 41 U.S.C.A. § 353(c). Here, the preponderance of the evidence demonstrates that DGS negotiated and paid collectively bargained wage rates during the term of its contract and had also negotiated prospective wage increases which were to take effect on October 1, 1995, after the conclusion of DGS's contract.

In summary, a preponderance of the evidence supports the ALJ's findings that Section 4(c) applied to Rasputin's contract; that the Security Guard CBA was applicable to Rasputin's SCA contract; that Rasputin failed to pay the required hourly wages and fringe benefits; and that Johnson failed to demonstrate the applicability of any exemption from Section 4(c) requirements. Accordingly, we affirm the ALJ's ruling that Rasputin committed SCA violations in the amount of \$280,079.62.

III. The SCA's Debarment Sanction and the Absence of "Unusual Circumstances" on this Record

We also conclude that Johnson has failed to demonstrate that the SCA violations were the result of "unusual circumstances," such as would be sufficient to relieve Johnson from the sanction of debarment. Accordingly, we affirm the ALJ's order that William Johnson be debarred from receiving contracts from the United States for a period of three years.

The SCA requires debarment – ineligibility to receive Federal contracts for a period of three years – of responsible parties for any SCA violation unless the service contractor demonstrates that "unusual circumstances" were present. 41 U.S.C.A. § 354(a). Although not defined in the Act, the Administrator, Wage and Hour Division, has promulgated a regulatory standard for determining the existence of "unusual circumstances" at 29 C.F.R. § 4.188(b). The regulations at 29 C.F.R. § 4.188(b)(1) and (2) provide a three-stage test for determining whether or not "unusual circumstances" exist.

Under the first stage, "*where the violations are the result of culpable conduct* such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, ... *relief from the debarment sanction cannot be in order.*" 29 C.F.R. § 4.188(b)(3)(i) (emphasis added). Here, the ALJ concluded that "by requesting a new wage determination from the Department of Labor (R-1), [Johnson] avoided the charge that they 'culpably disregarded' their obligations under the law." We reverse the ALJ's conclusion of law that Johnson did not culpably disregard his obligations because it is not supported by a preponderance of the evidence.

A preponderance of the evidence does show that Johnson was guilty of "culpable disregard" of his SCA obligations. The preponderance of the evidence demonstrates that the Wage and Hour Division's investigator informed Rasputin of how to comply with the SCA but Johnson, who was in de facto control of all payroll decisions, "disregard[ed] ... whether they were in violation or not.... 29 C.F.R. § 4.188(b)(3)(i).

Johnson set Rasputin's entire contracting scheme in motion by purporting to be Rasputin's president in order to obtain the Navy contract. D. & O. at 13. Johnson decided to accept the contract over Stewart's objections that the Rasputin contract was extremely underbid. *Id.* Johnson was an experienced Federal service contractor (having performed over 200 contracts). *Id.* Yet, as the de facto manager of Rasputin's

operations, he chose to ignore the Wage and Hour Division investigator's compliance guidance concerning the applicable CBA. *Id.* at 12. Johnson obtained the contract for Rasputin under the false pretense of being its president and was in de facto control of its operations for most of the contract's term. Moreover, when Johnson officially took over as Rasputin's president in August 1996, he continued his culpable disregard of SCA obligations to employees by failing to ensure restitution of back wages.

The preponderance of the evidence supports the conclusion of law that Johnson was guilty of culpable disregard of his SCA obligations because he was in de facto control of Rasputin throughout the entire term of the contract and he was the "party responsible" for the SCA wage violations. In a matter where the service contractor committed SCA violations after receiving the Wage and Hour Division's guidance on proper payment, our predecessor, the Board of Service Contract Appeals held:

that the preponderance of evidence in the record supports the conclusion that the holiday pay violations were committed either willfully or through culpable neglect. We have previously held that commission of SCA violations after specific notice that a particular practice is in violation, constitutes – at the very least – culpable neglect. ... Violations which are committed more than once -after proper notice - can also be seen as intentional, deliberate and willful.

Given this analysis, we conclude that the so-called "aggravated" factors (under 29 C.F.R. 4.188(b)(3)(i)) are clear: under the circumstances present here, Respondents' holiday pay violations were at least due to culpable neglect or culpable disregard of its SCA obligations. We also believe they rise to the level of having been committed willfully or deliberately, in the absence of any contrary showing by Respondents.

Nationwide Bldg. Maint., Inc. and William W. Johnson, BSCA No. 92-04, slip op. at 12 (Oct. 30, 1992).

Even were we to conclude that Johnson was not culpable, we still conclude that he must be debarred. Relieving Johnson from debarment would still not be permissible according to the remaining criteria of the "unusual circumstances" regulations.⁶ The

⁶ Johnson's argument that he should not be debarred because of his bankruptcy and purported inability to pay is unavailing. Debarment is the required sanction for "any violation" of the SCA; whether a violator can or cannot make restitution is not a consideration in the debarment question under the SCA or the "unusual circumstances" regulations.

second stage of the test for unusual circumstances requires that Johnson demonstrate a “good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). The preponderance of the evidence demonstrates that Johnson failed to meet most of these requirements. Johnson did not cooperate in the investigation; despite explicit advice to the contrary from the Wage and Hour Division’s investigator, Johnson was responsible for Rasputin’s failure to apply the correct CBA. Though more than \$280,000 in SCA back wages was owing, only slightly more than \$100,000 has been paid. Beyond cavil, Johnson has failed to make repayment of the back wages due the service employees.

The record, moreover, demonstrates that Johnson has no intention of ever complying with the SCA in the future by making restitution for the remaining back wages. As Rasputin’s president, in August 1996, Johnson directed the Navy to release approximately \$106,000 in withheld contract funds in partial satisfaction of the SCA back wage liability. When questioned at hearing about his “thought process in terms of allowing them to take the money” Johnson testified:

That there was [sic] monies owed to the employees for the payrolls and the wages. I wanted to make sure they got their monies that were owed to them that they were entitled to. I had, so to speak, really I felt no involvement on what was prior other than if it could be corrected to get it corrected.

TR II 182. Johnson’s wanting “to make sure they got their monies that were owed to them” is completely inconsistent with his stated belief that he had “no involvement” in the commission of the violations and his responsibility to ensure full restitution of the back wages. Thus, the record supports the conclusion that Johnson’s assurances of future compliance are inadequate.

Finally, we conclude that Johnson has failed to meet most of the non-mandatory requirements for determining “unusual circumstances” under the third stage of the regulatory standard. These factors include

whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor’s efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

Here, there was no issue of doubtful legal certainty; the Wage and Hour Division's investigator specifically advised Rasputin on how to properly compensate its employees. Johnson made no efforts to ensure compliance; indeed, he was responsible for Rasputin's payroll practices, which employed the incorrect CBA wage rates. Finally, the violations here were extreme both in amount and in their impact on the service employees, especially during the period when, as a result of Rasputin and Johnson's default on the contract, service employees went without being paid for four weeks.

In summary, we reverse the ALJ's conclusion that Johnson did not culpably disregard his obligations to employees. Instead, we conclude that Johnson was culpably negligent based on the preponderance of the evidence on the record. Moreover, we affirm the ALJ's conclusion that Johnson's failure to pay the back wages due precludes a finding of unusual circumstances. Finally, we conclude as a matter of law that Johnson failed to demonstrate the additional factors under the second and third stages of the "unusual circumstances" test as noted above.

IV. SCA administrative proceedings are exercises of the government's police and regulatory powers and therefore are not subject to the Bankruptcy Code's automatic stay provision

Seeking protection from creditors under the Bankruptcy Code (the Code) in 1997, Johnson filed for bankruptcy under Chapter 11; that proceeding was converted to a proceeding under Chapter 7 in 1998. D. & O. at 22. In April 2002, Johnson "amended schedule F of his bankruptcy petition to identify the United States Department of Labor as a creditor because of the Department's claim for back wages in this case" *Id.* (record citation omitted). Johnson argued below that this administrative proceeding should have been automatically stayed pursuant to 11 U.S.C.A. § 362(a). To the contrary, the ALJ ruled that the proceeding was an act of the government in furtherance of its police and regulatory powers and therefore not subject to the stay. Johnson appealed this ruling.

Upon filing a petition for protection, the Code mandates that most legal proceedings against the debtor-in-bankruptcy are automatically stayed. 11 U.S.C.A. § 362(a). However, certain legal actions and proceedings are not subject to the general automatic stay. Thus, Section 362(b)(4) of the Code provides that the filing of a bankruptcy petition does not operate to automatically stay

the commencement or continuation of an action or proceeding by a government unit ... to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C.A. § 362(b)(4)⁷ (emphasis added). The plain language of the Code therefore exempts proceedings to determine SCA back wage *liability (although not collection of a money judgment)* and eligibility for debarment.

The Code’s legislative history reinforces this conclusion. Thus, “where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed....” H. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977).

Case precedent supports our conclusion that SCA proceedings such as this are an exercise of the Department of Labor’s police or regulatory power to enforce a wage law applicable to a broad class of Federal contracts. In reaching this same conclusion, one court reasoned:

DOL’s pursuit of debarment and liquidation of back-pay claims was primarily to prevent unfair competition in the market by companies who pay substandard wages. Despite the fact that DOL sought liquidation of back-pay claims for specific individuals, we do not characterize the use of that remedy as an assertion of private rights. We conclude instead that the request for liquidation of back-pay claims was but another method of enforcing the policies underlying the SCA. ... Accordingly, *we hold that DOL’s enforcement proceedings in this case were exempt from the automatic stay under section 362(b)(4).*

Eddleman v. Department of Labor, 923 F.2d 782, 791 (10th Cir. 1991) (emphasis added). Accordingly, we affirm the ALJ’s ruling that this SCA proceeding to determine liability, back wage violations and eligibility for debarment was not subject to the automatic stay provision of the Code.

CONCLUSION AND ORDER

For the foregoing reasons, we **AFFIRM** the ALJ’s Decision and Order and **DENY** the Petition for Review. It is hereby **ORDERED** that William Johnson shall pay to the Department of Labor \$173,460.34 as back wages due for violations of the prevailing wage and fringe provisions of the Act. It is hereby further **ORDERED** that

⁷ In his D. & O., the ALJ cited to an earlier version of the Code in which the exemption for governmental police and regulatory actions and proceedings was treated in two separate subsections ((4) and (5)) of Section 362(b). The two subsections were consolidated as one Subsection 4 without substantive change in 1998.

William Johnson is subject to the sanction of debarment for a period of three years pursuant to Section 5(a) of the Act.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge